

parent/guardian, for her minor daughter; T.W., a minor student, and M.W. and J.W., the student's parent/guardian, for their minor son; and M.K. a minor student, and S.K, the student's parent/guardian, for her minor daughter, file this Reply in Support of Motion for Summary Judgment under Fed. R. Civ. P. 56, or Suggestion for Potential Mootness. They show:

**I. PLAINTIFFS ACCEPT THE ATTORNEY GENERAL'S PLEDGE THAT
EXECUTIVE ORDER 84 WILL NOT REISSUE**

Plaintiffs' pending motion is for summary judgment or, in the alternative, for conclusion due to suggestion of mootness. (D.E. 132, 132-1). Defendant Governor Lee, in his Response, agrees the matter should be concluded through the mootness doctrine, but not through summary judgment.

For mootness, which Governor Lee endorses, Plaintiffs had simply asked the Governor to clarify his intention *not* to reissue Executive Order 84, as was done in *Pleasant View Baptist Church v. Beshear*, 838 F.Spp'x 936 (6th Cir. 2020). That way, there would be no question about whether it was "capable of repetition," the *sine qua non* of mootness.

The Governor has declined to do so expressly. However, the Governor's counsel, the Attorney General, has now formally advised this District Court that Judge Lipman's Order—"there is no reasonable expectation that another Executive Order involving an opt-out masking provision will recur"—is correct. (D.E. 154, Response p. 5) (citing *G.S. ex rel. Schwaigert v. Lee*, 2:21-cv-5915, 2022 WL 1560391, at *7 (W.D. Tenn. 2022)). That seems to carry at least equal weight to an admission, particularly since the Attorney General uses the *G.S.* Order to both *support* mootness and to distinguish the necessity of a public statement from the Governor. (*Id.*)

Accepting the Attorney General's word that there is no realistic expectation that Executive Order 84 will recur, this matter may be concluded through the mootness doctrine.¹

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFFS

¹ Plaintiffs will renew their motion for attorneys fees and costs, as Judge Poplin surmised, given the different posture from when such motion was originally presented. (D.E. 152) (denying without prejudice Plaintiffs' motion for attorneys' fees and costs).

CERTIFICATE OF SERVICE

I certify that this Reply was served upon counsel of record for the Defendants, Reed Smith and Marty McCampbell for Governor Lee, through the Court's ECF filing system on September 18, 2022.

/s/ Jessica F. Salonus